No. 82-1303

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN BUTTREY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ANNE S. ALMY
KAY L. RICHMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 404 of the Clean Water Act, 33 U.S.C. 1344, is unconstitutional insofar as it delegates to the United States Army Corps of Engineers regulatory authority over civilian activities.

2. Whether the procedures employed by the Corps in processing petitioners' permit application under Section 404 satisfied the requirements of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Constitution, statutes and regulations:

Page

Constitution, statutes and regulations—Continued:

Page

Constitution, statutes and regulations—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1303

JOHN BUTTREY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in C.A. No. 81-3234 (*Buttrey I*) (Pet. App. A-1 to A-33) is reported at 690 F.2d 1170. The opinion of the court of appeals in C.A. No. 81-3649 (*Buttrey II*) (Pet. App. A-34 to A-44) is reported at 690 F.2d 1186. The opinions of the district court in both cases (Pet. App. A-45 to A-55, A-57 to A-76) are not reported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on November 8, 1982. The petition for a writ of certiorari was filed on February 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases challenge both the procedures used by the United States Army Corps of Engineers (the Corps) when it processes permit applications under Section 404 of the Clean Water Act, 33 U.S.C. (Supp. V) 1344, and, more broadly, Congress' delegation of regulatory authority to the Corps under Section 404.

1. a. The procedural challenge in *Buttrey I* arises from petitioners' unsuccessful attempt to obtain from the Corps a permit, required by Section 404, to undertake a dredge and fill operation in a wetland area known as Gum Bayou, near Slidell, Louisiana (Pet. App. A-2, A-32). Following petitioners' submission of a permit application, the Corps, on February 2, 1979, issued a formal public notice of the proposed operation (*id.* at A-2). Comments opposing issuance of the permit were then received from numerous private organizations and individuals, as well as three federal agencies, the Fish and Wildlife Service, the Environmental Protection Agency, and the National Marine Fisheries Service (*ibid.*).[1]

As required by Corps regulations, 33 C.F.R. 325.2(a)(3), all of the comments were forwarded to petitioners, who requested and were granted a six-month extension of time for submitting their response (Pet. App. A-3). Eventually, petitioners submitted a comprehensive response that included rebuttal of adverse comments; separate written comments prepared by a consulting engineer, a biology professor at Tulane University and several private individuals; and a legal memorandum supporting issuance of the

---

[1]As noted by the court of appeals (Pet. App. A-2 to A-3), those commenting objected that the proposed project would "destroy natural drainage and sewage treatment capacity, replace a habitat and nursery ground for wildlife with residential homes, perhaps irrevocably damage an aesthetically pleasing wetland area, and, finally, increase the risk of flooding."

permit (*id.* at A-3, A-17). Petitioners also sought notification of any specific objections considered by the Corps to warrant denial of the permit and an opportunity to respond to those objections; a conference with Corps officials; and an adversary hearing, with an opportunity to cross-examine witnesses, if the Corps was of the view that any particular objection might preclude issuance of the permit (*id.* at A-3). The responsible Corps official, District Engineer Colonel Ryan, responded that Corps regulations preclude a full adversary hearing; however, an informal conference took place on February 8, 1980.

On April 2, 1980, the Corps denied petitioners' permit application. The decision was explained and supported in three separate documents: an "Environmental Assessment," an "Evaluation of the Effects of the Discharge of Dredged or Fill Material Into Waters of the U.S. Using the Section 404(b) Guidelines," and a document entitled "Findings of Fact" (Pet. App. A-4, A-17). Pursuant to Corps regulations, these documents were mailed to petitioners (*id.* at A-17 to A-18).

b. On May 2, 1980, petitioners filed suit against the United States, the Secretary of the Army, and two Corps officials in the United States District Court for the Eastern District of Louisiana, challenging, *inter alia*, the procedures used by the Corps in processing Section 404 permit applications (Pet. App. A-4 to A-5). On cross-motions for summary judgment, the district court entered summary judgment in favor of respondents and against petitioners (*id.* at A-45 to A-56). The court held, so far as here relevant, that the Corps is not required to afford permit applicants formal adjudicatory hearings and that the procedures employed by the Corps in processing petitioners' permit application were not unconstitutional (*id.* at A-45 to A-46, A-50 to A-51).

2. a. The constitutional challenge, in *Buttrey II*, to Congress' delegation of regulatory authority to the Corps arises in the context of the Corps' issuance of two cease and desist orders to petitioners. The first, dated May 5, 1980, advised petitioners that their placement of fill in a wetland area preparatory to construction of a sewage treatment plant was regulated by the Corps and that initiating such work without a permit violated Section 404 of the Clean Water Act, 33 U.S.C. 1344. The second order, dated November 21, 1980, advised petitioners that their construction of a levee and dredging of a wetland area adjacent to the Morgan River were similarly regulated by the Corps and that initiating such work without a permit violated Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act. (Pet. App. A-34 to A-35.)

b. In response to these cease and desist orders, petitioners filed suit in the United States District Court for the Eastern District of Louisiana on January 21, 1981. Count I of the complaint, the only count here relevant, alleged that the Corps' exercise, under Section 404, of regulatory jurisdiction over private property and private activities of United States citizens is in violation of the Constitution because the Corps is a part of the military. Following submission of cross-motions for summary judgment on this issue, the court, finding no constitutional infirmity in the Corps' administration of the Section 404 program, granted the Corps' motion and denied petitioners'. (Pet. App. A-34 to A-36, A-72 to A-73.)

3. The court of appeals affirmed the district court's judgments in both cases (Pet. App. A-1 to A-33; *id.* at A-34 to A-44). Specifically, the court of appeals held that the delegation of authority to the Corps in Section 404 of the Clean Water Act is constitutional (Pet. App. A-44); that

neither the Administrative Procedure Act nor the Due Process Clause of the Fifth Amendment entitles petitioners to a trial-type hearing on their permit application (Pet. App. A-27); and that petitioners were given all the procedural protections to which they are entitled under the Due Process Clause (*ibid.*).

ARGUMENT

The decisions of the court of appeals are correct, do not conflict with any decision of this Court or any other court of appeals, and do not warrant review by this Court.

1. Petitioners argue (Pet. 8-15) that Section 404 of the Clean Water Act unconstitutionally delegates regulatory authority over civilian activity to the Corps, a branch of the military.

Petitioners rely on Article I, Section 8, Clauses 11-14 of the Constitution (the "war powers") and on several cases limiting the authority that Congress can extend to the military under its war powers. However, congressional authority to regulate discharges of dredged or fill material into waters of the United States is founded, not on the war powers, but on the Commerce Clause, and the Section 404 program has consistently been upheld as a proper exercise of the commerce power.[2] Delegation of this regulatory authority to the Corps, moreover, is an appropriate means of exercising this power. Prior to passage of the 1972 Amendments to what is now called the Clean Water Act, there was some dispute as to whether the Environmental Protection Agency or the Corps should be selected as the agency to implement the Section 404 program. Ultimately, however, the Corps was chosen because it had the expertise

---

[2]See, *e.g.*, *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979); *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 755 (9th Cir. 1978); *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1319, 1323-1324, 1325 (6th Cir. 1974).

and the administrative machinery necessary to implement the program. As Senator Muskie explained in presenting the conference agreement to the Senate:

> The Conferees were uniquely aware of the process by which the dredge and fill permits [under Section 10 of the Rivers and Harbors Act of 1899] are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.

118 Cong. Rec. 33699 (1972). Thus, as the court of appeals concluded (Pet. App. A-40), the end of the legislation — "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251(a)) — is clearly legitimate, and the means selected for achieving that end — granting regulatory authority to the Corps — are entirely appropriate under the Necessary and Proper Clause (U.S. Const., Art. I, § 8, Cl. 18). See *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421, 423 (1819); *Atkins* v. *United States*, 556 F.2d 1028, 1061 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

Nor is administration of the Section 404 program by the Corps prohibited by any other constitutional provision. Petitioners argue (Pet. 13-14) that the war powers clauses constitute a clear prohibition on use of a branch of the military for civilian functions and, further, that if Congress can legislate with respect to the military to the full extent of its commerce power, then the war powers provisions have no application or meaning. But nothing in the war powers clauses even addresses use of the military for civilian functions. See U.S. Const., Art. I, § 8, Cls. 11-14.[3] *Moreover*,

---

[3]In the court-martial cases on which petitioners principally rely (Pet. 12-13), the military's statutory authority to try civilians by court-martial was found to conflict with the civilians' constitutional rights to trial by jury and indictment by grand jury. See, *e.g.*, *Reid* v. *Covert*, 354

the fundamental purpose of the Founders in setting forth Congress' war powers was to limit *executive* action with respect to the military.[4] This purpose is in no way compromised by the Corps' administration of Section 404, because *Congress* explicitly authorized the program and selected the Corps to administer it.[5]

Finally, as the court of appeals suggested (Pet. App. A-43 to A-44), the Corps' exercise of regulatory functions under Section 404 does not elevate military over civilian power in

---

U.S. 1, 7, 19, 22 (1957). In contrast, petitioners have failed to cite any constitutional provision that is infringed by the Corps' administration of the Section 404 program. Furthermore, unlike the court-martial cases, the Section 404 program, as we have already noted, is authorized under the Commerce Clause, not the war powers, and Corps administration of the program is an appropriate exercise of the commerce power.

Although the Court's opinion in *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972), also cited by petitioners (Pet. 10-12), contains dicta referring to the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," the court of appeals correctly noted (Pet. App. A-43) that "nothing in the opinion suggests that the type of extension of authority involved in this case would come within that tradition."

[4]See, *e.g.*, Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 184-185 (1962) ("The President was made the Commander-in-Chief of the armed forces. But Congress was given the power to provide for the common defense, to declare war, to make rules for the Government and regulation of the land and naval forces, and to raise and support armies."); *Reid* v. *Covert*, *supra*, 354 U.S. at 68 (Harlan, J., concurring) (emphasis in original; footnote omitted) ("what [the Founders] feared was a military branch unchecked by the *legislature*, and susceptible of use by an arbitrary *executive* power"); *The Federalist No. 24* (A. Hamilton) (restraints upon the discretion of the legislature, in respect to military establishments, would be improper).

[5]In this context, petitioners' reliance (Pet. 9-10) on the legislative history of the Posse Comitatus Act is most curious. That Act prohibits use of the Army to execute the laws, "*except in cases and under circumstances expressly authorized by* the Constitution or *Act of Congress*." 18 U.S.C. 1385 (emphasis added). Thus, Congress explicitly reserved for itself the authority to direct the Army to execute the laws.

any proscribed fashion. The Corps exercises only that power which Congress directs it to exercise. Judicial review of the Corps' decisions is available in the civilian courts under the same standard of review that applies to other agency decisionmaking; no particular deference is given to "military judgment." And civilian control is also ensured by 10 U.S.C. (Supp. V) 3013, which requires that the Assistant Secretary for Civil Works, whose principal duty is supervision of Army functions relating to water resources conservation and development, "be appointed from civilian life by the President, by and with the advice and consent of the Senate." Clearly, the Corps' administration of the Section 404 program — like its historic responsibility for civilian functions relating to preservation and development of our Nation's water resources (see Pet. App. A-43) — is fully consistent with the Constitution.

2. Petitioners argue (Pet. 15-19) that, prior to denying their application for a permit under Section 404, the Corps was required, under the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. V) 551 *et seq.*, to hold a formal adjudicatory hearing, including opportunity for oral presentation of evidence and cross-examination.[6] Under the terms of the APA, however, the provisions governing formal agency hearings, 5 U.S.C. (& Supp. V) 556, apply only if the substantive statute authorizing the agency to act requires disputes to be "determined *on the record* after opportunity for an agency hearing." 5 U.S.C. (& Supp. V)

---

[6]Corps regulations provide permit applicants with a "paper hearing" — notice of objections to issuance of the permit and an opportunity to submit rebuttal to those objections. 33 C.F.R. 325.2(a)(3). The regulations also provide for "public hearings." 33 C.F.R. Part 327. But these are informal, information-gathering proceedings rather than trial-type adversary hearings. See 33 C.F.R. 327.3(a), 327.7, 327.8. Cross-examination of witnesses is not permitted. 33 C.F.R. 327.8(c).

554(a) (emphasis added).[7] In this case, the relevant statutory provision, Section 404(a) of the Clean Water Act, provides simply that the "Secretary [acting through the Chief of Engineers] may issue permits, after notice and opportunity for public hearings [8] for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Clearly the statute does not expressly require an adjudication "on the record."

While the absence of these words is not necessarily dispositive, there must be some evidence of congressional intent to require a trial-type hearing. *United States* v. *Florida E. C. Ry.*, 410 U.S. 224, 238 (1973); *United States Lines, Inc.* v. *Federal Maritime Commission*, 584 F.2d 519, 536 (D.C. Cir. 1978).[9] Petitioners, however, have cited no

---

[7] 5 U.S.C. 556(a) provides:

> This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

Section 553 deals with rulemaking and is, therefore, inapplicable. Section 554, entitled "Adjudications," provides, in pertinent part:

> This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *.

5 U.S.C. (& Supp. V) 554(a). As the latter section indicates, the requirement that the agency proceeding involve "adjudication" is a necessary, but not sufficient, condition for application of trial-type procedures under 5 U.S.C. (& Supp. V) 556.

[8] As noted by the court of appeals (Pet. App. A-10, quoting 2 K. Davis, *Administrative Law Treatise* § 12:7, at 434 (2d ed. 1979)), " 'when many are affected, [the term "public hearing"] usually means a speech-making hearing rather than a [trial-type] hearing with a determination on the record.' "

[9] Petitioners argue (17-18) that Section 404 requires trial-type hearings because three circuits have construed virtually identical language in Section 402(a)(1) of the Clean Water Act, 33 U.S.C. 1342(a)(1), as requiring that EPA, the permitting authority under Section 402, provide trial-type hearings to applicants for National Pollutant Discharge

such evidence. To the contrary, as the court of appeals observed (Pet. App. A-8), the relevant legislative history reflects that "Congress did not intend that the 'public hearings' called for in section 404 be trial-type hearings on the record." As discussed above (see pages 5-6, *supra*), the Corps, rather than EPA, was chosen as the authority to issue permits under Section 404 because Congress was "uniquely aware" of the process by which the Corps was already handling permits under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, and Congress did "not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." 118 Cong. Rec. 33699 (1970) (remarks of Senator Muskie). That pre-existing permit system operated pursuant to Corps regulations that provided for informal public hearings (33 C.F.R. 209.120(g) (1972)), but not for formal adjudicatory hearings. See, *e.g.*, *Taylor* v. *District Engineer*, 567 F.2d 1332, 1334-1336 (5th Cir. 1978). Thus, as the court of appeals pointed out (Pet. App. A-8), "[t]his is one of those rare instances when a statute's history leaves no room for doubt." Accordingly, the courts below correctly

---

Elimination System permits. As the court of appeals correctly noted (Pet. App.A-7 to A-8), however, none of the three opinions construing Section 402 held that the relevant statutory language — "after opportunity for public hearing" — was so clear that it was unnecessary to look beyond that language for indications of congressional intent to require a trial-type hearing. See *Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d 872, 875-878 (1st Cir.), cert. denied, 439 U.S. 824 (1978); *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1262-1264 (9th Cir. 1977); *United States Steel Corp.* v. *Train*, 556 F.2d 822, 833-834 (7th Cir. 1977). The presence of the term "public hearing" in both statutory provisions, accordingly, does not require that Section 404 be construed in the same way as Section 402. See also *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 218 (1980) ("opportunity for public hearing" requirement is "rather amorphous"); *Environmental Defense Fund, Inc.* v. *Costle*, 631 F.2d 922, 927 (D.C. Cir. 1980), cert. denied, 449 U.S. 1112 (1981) ("public hearing" may have different meanings, even in the same statute).

concluded that the APA does not require the Corps to conduct trial-type hearings in deciding whether to issue permits under Section 404. Accord: *Nofelco Realty Corp.* v. *United States*, 521 F. Supp. 458, 461 (S.D. N.Y. 1981).[10]

3. Finally, petitioners argue (Pet. 19-28) that they were entitled, under the Due Process Clause of the Fifth Amendment, to an adversary hearing on their permit application. The court of appeals correctly rejected this argument. In so doing, the court applied the three factors identified by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), as useful in determining what process is due in a given situation:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

First, the court of appeals properly concluded (Pet. App. A-14) that petitioners' private interest is not, in itself, sufficient to demand imposition of full trial-type procedures. As the court observed (*ibid.*), petitioner Buttrey is not a person "on the very margin of subsistence" and denial of his permit application will not deprive him of "the very means by which to live." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at

---

[10]This conclusion is also confirmed by the subsequent legislative history of the Clean Water Act. As the court of appeals noted (Pet. App. A-9 to A-10), when Congress amended the statute in 1977, it was not concerned with increasing the amount of "process" accorded Section 404 permit applicants but, rather, with simplifying and expediting the permit process. See S. Rep. No. 95-370, 95th Cong., 1st Sess. 80 (1977); H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 104, 105 (1977).

340 (quoting *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970)). Furthermore, the government in this instance was merely denying a request, not taking action against petitioners. This distinction is important, because "[r]evocation of a license is far more serious than denial of an application for one; in the former instance, capital has been expended, investor expectations have been aroused, and people have been employed." Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1296 (1975).[11] Thus, the degree of deprivation at stake here does not call for elaborate procedural protections.

Second, the court of appeals also correctly concluded (Pet. App. A-27) that the Corps' "paper hearing" procedures, together with an informal face-to-face conference, afforded petitioners a great deal of process and that requiring a trial-type hearing would probably not reduce the chance of error. As required by Corps regulations (33 C.F.R. 325.2(a)(3)), all comments opposing issuance of the permit were forwarded to petitioners, who then were given six months to prepare a comprehensive response, which included rebuttal of adverse comments, separate written comments prepared by a consulting engineer and a biologist, and a legal memorandum (Pet. App. A-3, A-17). Contrary to petitioners' suggestion (Pet. 24), the comments

---

[11]Cf. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 332 (*continued* receipt of disability benefits is a protected property interest); *Morrissey* v. *Brewer*, 408 U.S. 471, 481-482 (1972) (distinction between revocation of parole and denial of parole).

The distinction here is similar to that which the APA makes between applications for initial licenses, and applications for renewal of licenses or agency modification of licenses; in the former situation, an agency may proceed without a hearing "on the record." See 5 U.S.C. 556(d). Contrary to petitioners' assertion (Pet. 21), 5 U.S.C. 551 is not to the contrary; it does not require a hearing whenever an agency permit is granted, denied or revoked, but simply defines the process of "adjudication" as including these agency actions. See 5 U.S.C. 551(6) and (7), (9).

opposing issuance of the permit all tended to raise the same few objections (see Pet. App. A-2 to A-3), so there was no mystery regarding the nature of the comments to which petitioners needed to respond.[12]

The issues raised in the permit process, furthermore, were amenable to effective written presentation. Although petitioners argue (Pet. 25-28) that the court of appeals erred in finding (Pet. App. A-12, A-24) that their dispute with the Corps concerns only legislative facts, even at this stage they have failed to raise any genuinely disputed "adjudicative" facts.[13] Even if the wetlands determination could be construed as a question of adjudicative fact, petitioners conceded below (see Pet. App. A-32) that the project area is a wetland. As for the determinations of whether the proposed project would have adverse environmental effects and whether the public interest would be served by authorizing the project, these clearly involve "legislative" facts. The determinations do not entail review of past actions, but

---

[12]It also must be presumed that petitioners were aware that, under Corps regulations, their permit application would not be granted unless they demonstrated: first, that "the benefits of the proposed alteration outweigh[ed] the damage[s]"; second, that "the proposed activity [was] primarily dependent on being located in, or in close proximity to the aquatic environment"; and, third, that the proposed project could not be located on any "feasible alternative sites." 33 C.F.R. 320.4(b)(4). As the court of appeals remarked (Pet. App. A-25, citing *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973)), petitioners did not even attempt to make these showings and even "trial-type safeguards could do nothing to remedy so fundamental a flaw in the prima facie case."

[13]Adjudicative facts usually answer the questions of who did what, where, when, how, why, and with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion.

2 K. Davis, *supra*, § 12:3, at 413.

instead require predictive judgments that implicate questions of policy and discretion.[14] Thus, both determinations turn on the application of agency expertise and neither can be decisively resolved by the taking of testimony. Arguments usefully addressing these issues are therefore particularly appropriate for written presentation.[15] Oral presentation and cross-examination, on the other hand, are inappropriate because veracity and demeanor are not important where the determinations at issue turn on scientific judgment and expert opinion.[16] What is needed in such cases is a predecision opportunity, not to cross-examine, but to comment. Petitioners had this opportunity and took advantage of it. This is not a case where the permit applicant, his lawyers, his expert biologist and his expert engineer lacked ability to write effectively.[17] Thus, the second *Mathews* factor also does not entitle petitioners to an adversary hearing.

---

[14]As the court of appeals reasoned (Pet. App. A-19 to A-20, A-24), certain basic policy judgments in this case have already been made and these judgments foreclose much of petitioners' argument. For example, the Corps' regulations state: "Wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 C.F.R. 320.4(b)(1).

[15]See Friendly, *supra*, 123 U. Pa. L. Rev. at 1280. See also Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 Harv. L. Rev. 612, 630-631 (1971).

[16]See, *e.g.*, *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343-344 & n.28; *Basciano* v. *Herkimer*, 605 F.2d 605, 610-611 (2d Cir. 1978), cert. denied, 442 U.S. 929 (1979); 2 K. Davis, *supra*, § 12:8, at 437-438, 440.

[17]See Pet. App. A-16 & n.4. Compare *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) (written submissions unrealistic for most welfare recipients, who lack the education to write effectively and cannot obtain professional assistance). In any event, the Corps also gave petitioners an oral hearing with the District Engineer, thereby affording them an extra measure of process (see Pet. App. A-26).

Third, the court of appeals also properly concluded (Pet. App. A-14 to A-15) that requiring adjudicatory hearings in Section 404 cases would impose a substantial and costly burden on the government. As the court noted (Pet. App. A-15), the Mobile District alone processes some 1,200 applications per year, yet the Corps has no administrative law judges assigned to it. Under these circumstances, it is clear that the public's interest in seeing that the Corps carry out its statutory mandate would be compromised if formal hearings were routinely required.[18]

Accordingly, petitioners are not entitled to an adjudicatory hearing under the Due Process Clause. As the court of appeals concluded (Pet. App. A-27), this additional process "would simply not be worth the cost."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ANNE S. ALMY
KAY L. RICHMAN
Attorneys

APRIL 1983

---

[18]See *Costle* v. *Pacific Legal Foundation*, *supra*, 445 U.S. at 215 (requiring EPA to hold hearings routinely would raise questions about its ability to administer its program); S. Rep. No. 95-370, *supra*, at 80 (expressing congressional concern that delay in processing of Section 404 applications be eliminated); H.R. Conf. Rep. No. 95-830, *supra*, at 104 (same).